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IN THE

Supreme Court of the United States

OCTOBER TERM—1948.

UNITED STATES OF AMERICA EX REL MURAD A. SUTTON,

Relator-Appellant,

—against—

JAMES MULCAHY, United States Marshal for the Southern District of New York, and EDWARD E. THOMPSON, Warden of the Federal House of Detention,

Respondents-Appellees,

—*v.*—

JACK MENASHE,

Respondent-Impleaded-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BURTON B. TURKUS,
Attorney for Relator-Petitioner.

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—v.—

JACK MENASHE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner Murad A. Sutton prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on June 30, 1948, affirming a judgment and/or order of the United States District Court for the Southern District of

New York, entered on January 28, 1948 which resettled an order dismissing a writ of habeas corpus, which said order was entered on January 19, 1948 (R. 241-258*).

STATEMENT OF MATTERS INVOLVED.

The dismissal of the writ of habeas corpus obtained by relator-appellant sought to challenge his detention as an alleged civil contemnor.

Relator-appellant was adjudged in civil contempt and fined the sum of $22,000.00 by an order of Hon. Alfred C. Coxe dated December 21, 1947 (R. 125-135). Said order, in effect, supplemented a prior order of Hon. Harold R. Medina, United States District Judge, dated September 11, 1947 wherein and whereby relator was directed to testify before a Special Master (R. 118-124). In said habeas corpus proceeding the relator contended and contends that all proceedings in the United States District Court for the Southern District of New York, which led to his adjudication in civil contempt were void *ab initio*, for lack of jurisdiction of that Court. There is presently pending and undetermined in the Circuit Court of Hawaii (R. 10) a plenary action for the partnership accounting and for the appointment of a permanent receiver. This action originally had been instituted in the United States District Court for the Territory of Hawaii, which Court dismissed the action due to the lack of necessary diversity of citizenship whereupon the respondent-impleaded-appellee maintained the plenary suit presently existing herein in the Circuit Court of Hawaii. The relief prayed for in the plenary action is a dissolution of the partnership which existed between petitioner and the respondent-impleaded-appellee. In said plenary action, a temporary receiver was appointed on November 15th, 1946 on consent (R. 106-116). Said temporary receiver is still functioning and in the order appointing him both the relator-appellant and respondent-

* "R" refers to folio number in the Record on Appeal.

impleaded-appellee were specifically enjoined from interfering with the temporary Hawaiian receiver and the collection by him of any partnership money and funds (R. 114).

On January 10, 1947, the respondent-impleaded-appellee on the basis of the pendency of the plenary action in the Circuit Court of Hawaii instituted a proceeding for the appointment of an ancillary receiver in the United States District Court for the Southern District of New York (R. 40-51). A judgment was thereupon entered on consent on July 21, 1947 appointing one Israel B. Oseas as and for the temporary ancillary receiver in the Southern District of New York (R. 15-17). On September 11, 1947, an order was entered in the ancillary proceeding by United States District Judge Harold R. Medina wherein a Special Master was appointed to take the testimony of the relator, among others, for the purpose as set forth in said order, "of discovering the assets of the partnership in aid of the judgment herein" (R. 118-124).

Coincident with the entry of the said order, which relator then and now contends is a legal nullity, a notice of appeal therefrom was duly filed. However, the United States Circuit Court of Appeals for the Second Circuit indicated from the Bench that since said order was interlocutory in nature, it was therefore non-appealable. In the words of Judge Frank of the United States Circuit Court of Appeals for the Second Circuit, we find stated on page 1810 of his dissenting opinion the following:

> "That order, because interlocutory and not within the special statutory provisions as to appeals from interlocutory orders, is not appealable, as this Court holds when defendant promptly seeks to appeal therefrom. With that appeal dismissed by this Court, defendant then refused to obey the order to testify."

Subsequently and in no way conceding the validity of any prior orders or proceedings herein, relator appeared upon various and numerous occasions before the Special Master

and under objection was interrogated. During the pendency of the series of examinations which were adjourned from time to time before the Special Master, the attorney for respondent-impleaded-appellee made an application to Hon. Alfred C. Coxe, United States District Judge, to punish relator for civil contempt for his alleged failure to respond to certain questions put to him by the Special Master, and on the further ground that those questions which were answered were answered "evasively and without candor or good faith." Relator on said application to cite him for civil contempt directly put in issue the said alleged allegations of contempt, denied any misconduct on his part and requested a hearing pursuant to Rule 16 of the Civil Rules of the United States District Court for the Southern District of New York.

Despite relator's demand for a hearing on November 21, 1947, District Judge Coxe adjudged the relator in civil contempt and fined him $22,000.00 without according to him the hearing required and guaranteed by said Rule 16. Thereafter, and on the final hearing before the Special Master prior to the application of the relator for a writ of habeas corpus, his counsel requested that the realm of the alleged contempt be defined and this counsel for respondent-impleaded-appellee categorically refused to do. At the same time counsel for the relator objected to the interrogation by counsel for the impleaded-appellee, which objections were based on the claim that if any rights whatsoever existed either for an examination or to take any steps whatsoever in order to preserve any partnership assets in the jurisdiction embraced by the Southern District of New York, such rights were solely those of the temporary ancillary receiver and therefore could not be utilized by any adverse party whatsoever, who himself is subject to an examination by the said temporary ancillary receiver (R. 149-151). As a result of the taking of this legal position by relator, on advice of his counsel, a warrant of commitment was issued on December 15, 1947. A writ of habeas corpus was issued based upon

the order of December 15, 1947 by Hon. Alfred C. Coxe, District Judge, on December 18, 1947, which writ was dismissed on January 19, 1948, by District Judge John W. Clancy. From the order dismissing the said writ an appeal was taken to the United States Circuit Court of Appeals for the Second Circuit, which by a two to one decision of June 30, 1948 affirmed the order of Mr. Justice Clancy which dismissed the original writ.

On Wednesday, July 7, 1948, an application was made orally upon notice to the attorney for the respondent-impleaded-appellee for a stay of the mandate of the Circuit Court of Appeals for the Second Circuit. This motion was granted by Judge Augustus N. Hand upon the express condition that an application for a writ of certiorari be prepared and filed with the Supreme Court of the United States on or before August 1, 1948 and this said order granted the stay of mandate was entered on the 12th day of July, 1948.

QUESTIONS PRESENTED.

I.

Did the United States District Court for the Southern District of New York have jurisdiction to entertain the ancillary proceedings herein?

II.

Did the United States District Court for the Southern District of New York have jurisdiction to make an order directing an examination in the nature of supplementary proceedings herein?

III.

Did the United States District Court for the Southern District of New York have jurisdiction to appoint a Special Master herein?

IV.

Did the United States District Court for the Southern District of New York have jurisdiction to entertain an application to punish the relator for contempt?

V.

Did the United States District Court for the Southern District of New York have jurisdiction to enter a final order citing relator for contempt?

VI.

Did the United States District Court for the Southern District of New York have jurisdiction to order the commitment of the relator which was based upon the final order adjudging him in contempt?

VII.

Is the Circuit Court of the Territory of Hawaii "a Court of the United States?"

VIII.

Is the 1940 Amendment to 28 U. S. C. § 41(1) a constitutional statutory enactment?

REASONS FOR ALLOWANCE OF WRIT.

I. A Circuit Judge of the United States Circuit Court for the Second Circuit has stated as follows, in his concurring opinion (page 1805 of the decision):

> "* * * I have finally come to the conclusion that Judge Swan states the proper result now to be reached on the authorities by an intermediate court and that further exposition of the law, if necessary, must come from the Supreme Court."

II. The jurisdictional issue is now before the Supreme Court on grant of Certiorari 68, S. Ct. 746, Docket No. 640 in the case of *National Mutual Insurance Co. of the District of Columbia* v. *Tidewater Transfer Co., Inc.*

III. The jurisdictional questions presented has, as stated by Judge Clark in his concurring opinion quite divided the district courts and the law reviews and further it was suggested in 55 Yale L. J. 600, 603 in 1946 that the Court might "well resolve this divergence among the lower judiciary by declaring an act of Congress unconstitutional for the first time since 1936."

IV. The holding by the District Court of the United States for the Southern District of New York that it had a right to cite relator for civil contempt and disregard its own rules, to wit, its Rule 16.

V. The fact that there was a vigorous dissent on the part of Circuit Judge Frank.

VI. The apparent inability of the Circuit Court of Appeals to determine whether or not a final order adjudging an alleged contemnor in civil contempt is or is not an appealable order.

VII. The fact that it is or is not necessary to take an appeal from an appealable interlocutory order in order to determine the relator's rights.

VIII. The decision of the Circuit Court of Appeals of the Second Circuit to the effect that the relator should not be discharged although the District Court for the Southern District of New York had no jurisdiction.

IX. The fact that relator has forever lost his right to complain of the want of jurisdiction in the District Court

solely by reason of the fact that he did not appeal from either of the two previous interlocutory orders which were void.

X. The fact that Judge Frank has stated in his dissenting opinion and has cited cases of the Supreme Court of the United States which are at variance each with the other in that it was decided on the one hand that an order adjudging an alleged contemnor in civil contempt is not appealable and, on the other hand citing those decisions of the Supreme Court which may have held to the contrary.

XI. Statute 28 U. S. C. Section 41(1) has been held unconstitutional by two Circuit Courts of Appeal.

WHEREFORE, your petitioner prays that a writ of certiorari issued to the United States Court of Appeals for the Second Circuit demanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reviewed and the petitioner be granted such other, further and additional relief as may be proper.

Dated, July 23, 1948.

Murad A. Sutton

BURTON B. TURKUS,
Counsel for Petitioner.

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—*v.*—

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Respondent-Impleaded-Appellee.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record filed herein. No opinion was rendered by the United States District Court for the Southern District of New York.

JURISDICTION.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on July 12, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C., Section 347.

STATEMENT OF THE CASE.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

SPECIFICATION OF ASSIGNED ERRORS TO BE ARGUED.

The assigned errors to be argued are identical with the "reason for allowance of writ" set forth in the foregoing petition.

ARGUMENT.

1. THE ENTIRE ANCILLARY PROCEEDINGS AND ANY PROCESS BASED THEREON ARE VOID FOR LACK OF JURISDICTION.

The ancillary action is entirely void and we respectfully submit that the Court had no jurisdiction to entertain it or issue process predicated on its pendency, for the reason that the Circuit Court of the First Judicial Circuit of the Territory of Hawaii is not a *Court of the United States.* In the case of *Reynolds* v. *United States,* 98 U. S. 145, 25 L. Ed. 244, Chief Justice Waite, in delivering the opinion of the Supreme Court of the United States affirmatively held that a statute giving the District Court of the Territory of Utah the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, does not make Territorial Courts, Courts of the United States. So too, in *Howard* v. *United States,* 22 Ct. Cl. 305, it was held that a Territorial Court is not a Court of the United States within the meaning of Article 3, Section 1, of the Constitution, but is, in fact, a creation of Congress subject to the legislature only.

A perusal of the Organic Act of 1900 (48 U. S. C. 641) reveals that there have been established in Hawaii Courts of the United States which are *District Courts* of the United States. However, Section 631 of the same title establishes the Territorial Courts which consist of the Supreme Court

and the Circuit Courts (just such a Circuit Court in which the main and plenary actions of *Menashe* v. *Sutton* are now pending in Hawaii). So too, in decisions had, pursuant to the wording of Section 631, *supra*, we find that the legislature of Hawaii has authority to create only inferior courts.

Territory v. *Miguel*, 18 Hawaii 402.

There is no diversity of citizenship whatsoever here as all the parties to the plenary and ancillary actions heretofore instituted by the said Jack Menashe are residents of the State of New York. On October 18, 1946, the United States District Court of Hawaii decided it had no jurisdiction in these matters. Therefore, since the United States District Court of Hawaii could not, in any event, secure jurisdiction in these matters, the Court, *a fortiori*, cannot acquire any jurisdiction of a derivative nature from the Circuit Court of Hawaii.

It is a well-settled rule of law that in order for diversity of citizenship to sustain Federal jurisdiction, it must be demonstrated that all parties on one side of the controversy are citizens of different states or territories from all those on the other side.

Indianapolis v. *Chase Nat. Bank*, 314 U. S. 63;

Mitchell v. *Maurer*, 293 U. S. 237, 244.

The number of parties on either side of the case is immaterial provided every party on each side of the controversy is a citizen of a different state or territory from every party on the other side.

Jurisdiction will not attach if any of the adversary and indispensable parties are citizens of the same state or territory.

In *Thomson* v. *Gaskill*, 315 U. S. 442, 446, the Court said that:

> "The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction."

Jurisdiction cannot be conferred upon a Federal court by agreement, consent, or collusion of the parties, whether contained in their pleadings or otherwise, and a party cannot be precluded from raising a jurisdictional question by any form of laches, waiver, or estoppel. (Jud. Code Sec. 37, 28 U. S. C. A. Sec. 80.)

In *Albert Pick & Co.* v. *Cass-Putnam Hotel Co.*, 41 F. (2d) 74, 76, the Court said:

> "Moreover, the presence of the required diversity of citizenship cannot be waived by the parties where it is the ground on which this Court acquires its jurisdiction. If there is in fact the necessary diversity of citizenship, the privilege of insisting upon the proper venue of the suit may be waived, but, if diversity of citizenship is lacking and there is no other basis for jurisdiction, it is the only duty of the court, even on its own motion, to dismiss the suit as soon as its lack of jurisdiction is discovered. Chicago, Burlington & Quincy Railway Co. v. Willard, 220 U. S. 413, 31 S. Ct. 460, 55 L. Ed. 521; Chicago, Rock Island & Pacific Railway Co. v. Stephens, 218 F. 535 (C. C. A. 6)."

In *Mitchell* v. *Maurer*, 293 U. S. 237, 244, the Court stated:

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties."

The question as to whether or not a Territorial Court of Hawaii is or is not a "Court of the United States" has been decided in the negative by the Supreme Court of Hawaii itself. *International Longshoremen's and Warehousemen's Union (CIO) Local 144* v. *Cable A. Wirtz*, as Judge of the *Circuit Court of Second Judicial Circuit of the Territory of*

Hawaii, 37 Hawaii 404. In that case, the CIO petitioned for a writ of prohibition against Judge Wirtz of the Circuit Court of Hawaii. Judge Le Baron delivered the opinion of the Supreme Court of Hawaii and he stated:

> "The pleadings present but one question of law. Is a Circuit Court of the Territory a 'court of the United States' * * * ?"

Judge Le Baron answered this question by stating that:

> " * * * The Second Circuit Court of the Territory * * * not being a 'court of the United States' * * * the petition for the writ of prohibition is dismissed and the temporary writ dissolved."

There was then a petition for a rehearing which was denied by the full bench of the Supreme Court of Hawaii (37 Hawaii 445), in a *per curiam* opinion as follows:

> "Bearing in mind that the court's opinion resolved in the negative the sole issue presented, which is whether the Second Circuit Court of the Territory is a 'court of the United States' * * * the petition for rehearing and reargument is denied * * * "

The Court further stated that the United States District Court for the District of Hawaii was "the only legislative court in the Territory * * * " and that due to the Organic Act, 48 U. S. C. A. Section 642, Congress, "in the absence of any manifestation to the contrary * * * " showed "an intent to exclude therefrom the other Second Circuit Court of the Territory which has not Federal but Territorial jurisdiction and is not required to proceed in the same manner as a District Court of the United States."

The leading case on the point of defining "Courts of the United States" is *McAllister* v. *United States*, 141 U. S. 174, wherein the Supreme Court of the United States held that the District Court of Alaska was not a "Court of the United States." In that case, the Court cited numerous cases, in-

cluding *Benner* v. *Portor,* 50 U. S. 235, the very case cited by Judge Hulbert in an opinion holding that the Court below had jurisdiction. It is respectfully submitted that the *Benner* case is authority for the opposite conclusion than the one arrived at by Judge Hulbert.

The *Benner* case flatly holds:

> "The territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body was incapable of conferring upon a court within the limits of a State."

In *Dill* v. *Ebey,* 229 U. S. 199, the Court held that the United States District Court of Oklahoma Territory was not a "court of the United States" in regard to equity matters. Precisely to the same effect was the ruling of the Hawaiian Supreme Court in *Kainea* v. *Kreuger,* 30 Haw. 860. In *Mookini* v. *United States,* 303 U. S. 201, the Court ruled that the United States District Court of Hawaii was not a "court of the United States."

Certainly if a United States District Court in the Territory is not a "court of the United States," *a fortiori* a Circuit Court (i.e. County Court) of the Territory is not.

In *Young* v. *United States,* 176 F. 612, the Court remarked that "it was long ago settled that the territorial courts are not federal courts * * * " citing *Clinton* v. *Englebrecht,* 13 Wall (U. S.) 434 and other cases. And in the very recent case of *Alesna & Rice,* 69 F. Supp. 879, the Court ruled flatly that the Circuit Court of Hawaii is not a "Court of the United States."

(a) History of Hawaiian Organic Act Indicates Unmistakable Congressional Intent to Grant Such Autonomy to Territorial Legislature and Courts, and Entirely Separate Jurisdiction and Procedure of Federal Court in Hawaii from that of Local Territorial Courts.

The Hawaiian Islands were annexed by a Joint Resolution of Congress (Res. No. 55), known as the Newlands Resolution, 30 Stat. 750, enacted July 7, 1898, which among other things, not only uniquely recognized Hawaii's claim to its own public lands by rendering inapplicable to them the existing laws of the United States relative to public lands and guaranteeing that the revenues therefrom should forever be used for the benefit of Hawaii's people (a distinction that only the State of Texas can claim), but also continued in effect the "municipal legislation of the Hawaiian Islands," with certain minor exceptions, until Congress "shall otherwise determine," and created a commission of five persons to "recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper."

This Commission, composed of two senators and one representative of Congress, and two local citizens of Hawaii, prepared and submitted to Congress a Comprehensive printed report setting forth their findings and recommendations, including a draft of a proposed organic act for the Territory, which was finally enacted with minor amendments. (See HAWAIIAN COMMISSION MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE HAWAIIAN COMMISSION, APPOINTED IN PURSUANCE OF THE "JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES," APPROVED JULY 7, 1898; TOGETHER WITH A COPY OF THE CIVIL AND PENAL LAWS OF HAWAII [Document No. 16, 55th Cong., 3d. Sess.].) This report is most significant because its recommendations as to the judiciary with the exception of the proposals to have the Territorial Judges appointed by the local Governor with the approval of the local Senate, and to

give the Federal Judge life tenure, were followed by Congress in finally passing the Organic Act.

At pages 17-18 of this report the Commission said (emphasis added):

> "* * * the commission deem it proper to say that the people of Hawaii are capable of self-government, and have proven this by the establishment of the Republic of Hawaii and the adoption *of a constitution and code of laws which will compare favorably with those of any other government, and under such constitution and laws have maintained a stable government for several years worthy of a free people.* The people of those islands are more or less familiar with the institutions and laws of the United States, while the laws of the little Republic are largely taken from the laws of this country."
>
> "To this report may be added that the foundation of the legal system of the islands is the common law of England, and that the penal laws and practice is codified, and there are no penal offenses except those enumerated in the code. The civil law in its practice and procedure is partially codified.
>
> "In view of the foregoing report *it must be considered wise and safe to provide for the organization of the Territorial courts of the Territory of Hawaii by substantially continuing them as now existing under the Republic of Hawaii, and this has been done in the present bill. The reasons also stated in the report for the separation of Federal and Territorial jurisdiction and the creation of a new judicial district of the United States for the islands and the establishment of a district court sufficiently explain and sustain the provisions for such a court in section 87 of the bill.*" (Emphasis added.)

In the debates on the Bill, S. 222, which became the Organic Act, Sen. Cullom, one of the Commissioners who prepared the Bill and one of its chief proponents, even more emphatically pointed out that the theory and purpose of the Bill was to set up *separate court systems* in Hawaii, one purely Federal, and one purely Territorial or local, *just as in a State.* Senator Morgan arguing in favor of both separation of Federal and Territorial courts and the appointment of local Judges by the Governor of the Territory, also reiterated this view.

It will thus be seen that, at the very creation by Congress of the Territorial government, Congress wished *no part of Federal jurisdiction or procedural provisions to be applicable to the Territorial government and courts,* but wished to leave them *entirely autonomous, just as in a State.* Examining the Hawaiian Organic Act, as passed by Congress we find that these views were fully carried out as to separation of the Federal and Territorial judicial systems.

(b) Hawaiian Organic Act Provisions Indicate Clearly Congressional Intent to Grant, and Actually Provide For, Such Autonomy and Absolute Separation of Jurisdiction and Procedure of Federal Court in Hawaii from that of Local Territorial Courts.

Thus Sec. 1 of the Organic Act (31 Stat. 141, 48 U. S. C. A. 493) defines "the laws of Hawaii" to mean the constitution and laws of the Republic of Hawaii in force at the time of the annexation, and refers to certain codifications of the civil and penal laws of Hawaii, which were printed and made a part of the report of the Hawaiian commission that drafted the Act, and which indicated the existence of a complete system of laws in a well-ordered local government.

By Section 5 of the same Act (31 Stat. 141, 48 U. S. C. A. 495), as later amended in 1910 (36 Stat. 443), the Constitution and all laws of the United States "not locally inapplicable" were extended to Hawaii, but practically all of the general laws of the United States *relating to territories* were

expressly made inapplicable to Hawaii. Thus Sections 1841-1891, and 1910 and 1912 of the U. S. Revised Statutes were made inapplicable to Hawaii. These sections included provisions relating to election of Justices of the Peace (§ 1856), Supreme Court (§ 1864), judicial districts (§ 1865), limitations on jurisdiction of Justices of the Peace (§ 1867), *chancery* and common law *jurisdiction* of Supreme and district courts (§ 1868), appeal and error (§ 1869), Federal jurisdiction of district courts (§ 1910), power of Supreme and district courts to issue writs of habeas corpus (§ 1912), and many other general provisions as to organization, personnel, etc., of Territorial courts. These exemptions serve only to emphasize more fully the *complete local autonomy intended by Congress* for the Territorial judicial system, as opposed to the purely Federal United States District Court for Hawaii hereinafter mentioned.

In reporting on the Bill (S. 3360) which amended Section 5 of the Organic Act in 1910 (36 Stat. 443), the Senate Committee on Pacific Islands and Puerto Rico says, among other things:

> "* * * The main object to the amendment is to remove the uncertainty, which has at times caused trouble, as to whether the provisions of the organic act are exclusive in regard to the general subjects to which they relate, or whether other provisions of the federal laws, upon the same general subjects, but enacted with special reference to other Territories, though in general terms, also apply to Hawaii.
>
> "It is believed both that the subjects covered by the laws excepted in this proviso are sufficiently covered by the Organic Act and that the excepted laws do not now, as a matter of construction, apply to Hawaii. But the uncertainty should be removed. * * * Senate Rept. No. 126, 61st Cong., 2d Sess."

To the same effect is the report of the House Committee on Territories, in Report No. 910, same session.

In the debates on this amendment in 1910, Senator Depew, the principal proponent of the Bill, said:

> "It is a tribute, and a remarkable one, to the self-governing powers of the Hawaiian people that they should have been granted in the Organic Act *conditions of self-government which have not been given to any other of our possessions or territories.*"

quoting the report of the Commission which drafted the Organic Act, cited *ante* (45 Cong. Rec. 2292).

By Section 6 of the Organic Act (48 U. S. C. A. 496) it was provided (emphasis added):

> "That the *laws of Hawaii* not inconsistent with the Constitution or *laws of the United States* or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

The Organic Act fully recognized and perpetuated the separate autonomy of the Territorial legislature and courts. Section 10 of that Act (48 U. S. C. A. 501) provided:

> "That all rights of action, *suits at law* and *in equity*, prosecutions * * * existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed; * * * All offenses which by statute then in force were punishable as offenses against the Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this Act, or shall be repealed or changed by law * * * *all actions at law, suits in equity*, and other proceedings then pending * * * shall be carried on to final judgment and execution in the *corresponding courts of the Territory* of Hawaii. * * * " (Emphasis added.)

Section 11 of the Organic Act (48 U. S. C. A. 505) provides for the style of process in the "Territorial courts" to run in the name of "The Territory of Hawaii." Section 81 of the Organic Act (48 U. S. C. A. 631) vests *"the judicial power of the Territory"* "in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish," and provides that:

> "* * * until the *legislature* shall otherwise provide, the *laws of Hawaii* heretofore in force concerning the *several courts* and their *jurisdiction and procedure* shall continue in force except as herein otherwise provided." (Emphasis added.)

Section 82 (48 U. S. C. A. 632) provides for the Supreme Court of the Territory, and Section 83 (48 U. S. C. A. 635) reiterates:

> "That the *laws of Hawaii* relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, *subject to modification by Congress, or the legislature.* * * *" (Emphasis added.)

Finally, by Section 55 of the Organic Act (48 U. S. C. A. 562), Congress provided:

> "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

Although in the foregoing sections and certain others, such as Section 84 (48 U. S. C. A. 636), Congress (as would be natural in an organic law for the organization of a territorial government, just as it would in a constitution for a state government) laid down certain general basic restrictions on the general powers of the legislature and on the jurisdiction and procedure of territorial courts, the general

pattern of the local territorial judiciary and the power of the legislature to regulate its jurisdiction and procedure remained practically intact, the same essentially as in the case of a state judiciary.

These local "laws of Hawaii" relating to the judiciary, which Congress so carefully left intact, the same practically as in the case of a state, embraced an *entire code of civil laws,* and an *entire code of penal laws* (printed as part of the Hawaiian Commission's report to Congress, of which only a relatively few sections were expressly repealed or amended by Sections 7 (omitted from Title 48; see note to § 496) and 83 (48 U. S. C. A. 635) of the Organic Act.

Congress, on the other hand, in the Organic Act, after providing for the *Territorial* courts under the heading "CHAPTER IV. THE JUDICIARY" (see 31 Stat. 157), obviously referring to the *Territorial* judiciary, just as in the previous titles such as "CHAPTER II. THE LEGISLATURE" (31 Stat. 144), and "CHAPTER III. THE EXECUTIVE" (31 Stat. 153) it referred to the *Territorial* legislature and *Territorial* executive, then expressly differentiated between such *Territorial* officers and *Federal* officers, by the title "CHAPTER V. UNITED STATES OFFICERS" (31 Stat. 158), under which Congress then provided for the Delegate to Congress and various *Federal* officers, and under the subtitle "FEDERAL COURT" (31 Stat. 158), provided, in Section 86 of the Organic Act (48 U. S. C. A. 641-645) for a Federal district court (see *U. S.* v. *Bower* (1914), 4 U. S. D. C. Haw. 466-467) That section provides, among other things:

> "* * * Said court *shall have,* in addition to the *ordinary jurisdiction of district courts of the United States,* jurisdiction of all cases cognizable in a *circuit court of the United States, and shall proceed therein in the same manner as a circuit court;* and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii *all the powers* conferred by the *laws of the United States* upon the *judges,* district attorneys, and marshals *of district*

and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The *laws of the United States* relating to appeals, writs of error, *removal of causes, and other matters and proceedings,* as between the *courts of the United States* and the *courts of the several States* shall govern in such matters and proceedings as between the *courts of the United States* and the *courts of the Territory of Hawaii.* * * * (31 Stat. 158)." (Emphasis added.)

(c) The Decisions of Both the Territorial and the Federal Courts Have Consistently Recognized and Given Full Effect to this Congressional Mandate and Intent to Grant Autonomy to the Local Legislature and Territorial Courts as to Jurisdiction and Procedure and to Entirely Separate the Jurisdiction and Procedure of the Federal Court in Hawaii from that of the Territorial Courts.

This clear mandate of Congress as to the practical autonomy of the Territorial legislature and courts, has been recognized and given effect in many ways by the Territorial courts, the Federal or United States District Court for Hawaii, and the Federal appellate courts.

Thus, it has been held that the powers of the Territorial legislature are practically those of a State under the grant by Section 55 of the Organic Act (31 Stat. 150, 48 U. S. C. A. 562), of legislative power extending "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

By the Organic Act Congress organized for the Territory a sovereign government, having immunity from suit without its consent; such a government is itself "the fountain

from which rights ordinarily flow." *Kawananakoa* v. *Polyblank* (1907), 205 U. S. 349, 51 L. ed. 834.

In *Puerto Rico* v. *Shell Co.* (1937), 302 U. S. 253, 260-263, 82 L. ed. 235, 242-243, the Court held provisions of the Puerto Rican Organic Act to be "as broad and comprehensive as language could make it," and that the aim of such Acts was to grant "full power of local self-determination, with an autonomy similar to that of the states. • • • "

See also *In re Craig* (1911), 20 Haw. 483, 490, *Yerian* v. *Territory of Hawaii* (9 Cir. 1942), 130 F. (2d) 786, 788, as to *power of taxation* and police power.

This legislative autonomy extends to the courts. Referring to the Organic Act the United States Attorney General has said (emphasis added):

> "Indeed, it would be difficult to frame language more clearly subjecting to legislative change *the whole matter* of 'the *laws of Hawaii* heretofore in force *concernings courts and their jurisdiction and procedure*' and 'relative to the judicial department.' • • • • " (23 Ops. Attys. Gen. U. S. 539, 543.)

Likewise, it has been held that the *jurisdiction and powers of Territorial courts are practically those of a State court*, that the relationship between the Territorial courts on the one hand and the Federal including the United States District Court in Hawaii, is substantially the same as that between State courts and Federal courts in a State, and that in these respects the purely Territorial judicial system was unique in the history of Territories. See *Hind* v. *Wilder's S.S. Co.* (1900), 13 Haw. 174, 182; *Wilder's S.S. Co.* v. *Hind* (9 Cir. 1901), 108 F. 113, 114-116; *U. S.* v. *Bowers* (1914), 4 U. S. D. C. Haw. 466, 467.

For decisions holding that the Federal rule against interference by habeas corpus in Federal courts with the proceedings of State courts is equally applicable to the Territory, see also:

> *In re Curran* (1916), 4 U. S. D. C. Haw. 730, 738-739;

Soga v. *Jarrett* (1910), 3 U. S. D. C. Haw. 502, 506-509;

In re Atcherley (1909), 3 U. S. D. C. Haw. 404, 421;

In re Marshall (1900), 1 U. S. D. C. Haw 34.

See also *Yeung* v. *Territory of Hawaii* (9 Cir., 1942), 132 F. (2d) 374, 378 as to the complete separation of Territorial and Federal courts.

Furthermore, the Federal appellate courts, particularly with respect to a Territory having a dual system of courts (Territorial and Federal) like Hawaii's, have emphatically adopted the rule that the decisions of such Territorial courts on matters of local law or local concern are generally controlling on the Federal appellate courts.

Waialua Agricultural Co. v. *Christian* (1938), 305 U. S. 91, 106-109, 83 L. ed. 60, 70-72.

On the other hand, the Ninth Circuit Court has very recently had occasion to emphasize the difference between the judicial system of Alaska, which still has but one set of courts with both Federal and local jurisdiction, and that of a Territory like Hawaii which has entirely separate systems, again emphasizing the autonomy of the Hawaii Territorial courts. Thus, in *Carscadden* v. *Territory of Alaska* (9 Cir., 1939), 105 F. (2d) 377, it was held that in reviewing decisions of the District Court of Alaska the Circuit Court of Appeals exercises independent judgment with respect to general, local and Federal questions and review of the decision of such a court on general or local law is not limited to cases of manifest error, distinguishing the *Waialua* case, *supra*, and other similar cases.

(d) The Term "Court of the United States" Has a Well Defined Meaning.

Section 1 of Article III of the Constitution of the United States provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

Courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article defines the jurisdiction of such courts but does not allocate the jurisdiction to any particular court, save in one particular, that being in the case of the Supreme Court.

The section provides that:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

Congress cannot, of course, by legislation limit this jurisdiction or in any way affect it. For example Congress could not, even had it so desired, make the Norris-LaGuardia Act applicable to a case in the United States Supreme Court wherein a State applied for an injunction in a labor dispute.

Pursuant to the power and authority granted to it by Article III Congress has created certain inferior courts, they being, the Circuit Court of Appeals, the Circuit Court (later abolished) and the District Court. These courts, along with the Supreme Court are known as "Courts of the United States." Sometimes they are referred to as "constitutional courts" to distinguish them from "legislative courts" which, although created by Congress, were not brought into being by virtue of the authority granted to Congress under Article III of the Constitution. "Legislative courts," which is the class of courts to which our Territorial courts belong, are not "courts of the United States." They are created by virtue of the general right of sovereignty which exists in the Government, or by virtue of that clause of the Constitution which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.

The distinction between "courts of the United States" and "legislative courts" is brought out in the case of *McAllister* v. *United States* (1891), 141 U. S. 174, 179, 184, 35 L. ed.

693, 694-695, 696, decided by the United States Supreme Court in 1891, which collects the pertinent cases.

The case involved an appeal from a judgment of the Court of Claims dismissing a petition to recover a sum alleged to be due the petitioner for salary as District Judge for the District of Alaska. The President, during a Senate recess, had suspended the petitioner from his office and appointed one Dawson as his successor. Section 1768 of the U. S. Revised Statutes provided as follows:

> "During any recess of the Senate, the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, *except judges of the courts of the United States.*" (Emphasis added.)

The petitioner contended that he was a Judge of a Court of the United States. The Court held that he was not. It pointed out that the District Court of Alaska was created by Act of Congress to have and exercise the civil and criminal jurisdiction of District Courts of the United States, the Judge to be appointed by the President with the advice and consent of the Senate. The Court (141 U. S. 179, 35 L. ed. 694-695) said:

> "But is the court, thus established for Alaska, one of the '*courts of the United States*' within the meaning of section 1768 of the Revised Statutes?" (Emphasis added.)

The Court reviewed the various cases, holding that Territorial courts are not courts of the United States, and said:

> "These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that *courts in the Territories,* created under the plenary municipal authority that Congress pos-

> sesses over the Territories of the United States, are *not courts of the United States.*"
>
> * * * * *
>
> "For the reasons we have stated it must be assumed that the words 'judges of the courts of the United States' in section 1768 were used with reference to the *recognized distinction between courts of the United States* and *merely territorial or legislative courts.* 141 U. S. 184, 35 L. ed. 696."

In *Dill* v. *Ebey* (1913), 229 U. S. 199, 57 L. ed. 1148, the Court held that the United States District Court for the Western District of the Oklahoma Indian Territory was not a court of the United States within the meaning of the United States Revised Statutes, Section 723 providing that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

We have the Supreme Court of the Territory in *Kainea* v. *Kreuger* (1929), 30 Haw. 860, holding (quoting from the syllabus, p. 861) that

> "a territorial court of Hawaii is not a 'court of the United States' within the purview of United States Judicial Code, section 267 (title 28, Sec. 384, U. S. C. A.) which provides that 'suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law.'"

In *Mookini* v. *United States* (1938), 303 U. S. 201, 82 L. ed. 748, it was held that the United States District Court for the Territory of Hawaii was not a "District Court of the United States" within the meaning of the Criminal Appeal Rules promulgated by the United States Supreme Court on May 7, 1934 (Rule III, 292 U. S. 662, 663, 78 L. ed. 1513) which by their terms were limited to proceedings "in criminal cases in District Courts of the United States and in the

Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals, in the Court of Appeals of the District of Columbia and in the Supreme Court of the United States," such rules having been promulgated pursuant to the Act of March 8, 1934, amending the Act of February 24, 1933, 28 U. S. C. A. Section 723a, authorizing the U. S. Supreme Court to prescribe rules in criminal cases "in District Courts of the United States, *including the District Courts of* * * * *Hawaii.*"

A long list of authorities including the *McAllister* case is cited in support of the conclusion reached. If it be true that the *Federal* District Court of Hawaii is not a "District Court of the United States" how can it be argued with any degree of plausibility that the Circuit Court of the Territory of Hawaii is a "court of the United States"?

In *Young* v. *United States* (C. C., W. D. Okla. 1910), 176 F. 612, the Court said:

> "* * * It was long ago settled that the *territorial* courts are *not federal courts,* and that the procedure obtaining in them is that prescribed by the territorial Legislature. Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659; * * *." (Citing other cases; emphasis added.)

In this brief, we have produced an almost unanimous line of numerous decisions from the earliest times to date, in which "court of the United States," as used in statutes relating to jurisdiction and procedure of Federal courts, has been held not to include legislative courts.

Thus an analysis of all the foregoing points to one conclusion, to wit: Since the court of original jurisdiction in the main action is a non-Federal court, the court has no jurisdiction in any ancillary matter arising from the said main action.

Circuit Judge Clark stated, in his concurring opinion affirming the dismissal of the writ of habeas corpus that:

"My doubts center about the fact that if the 1940 amendment to 28 U. S. C. A. § 41(1) is invalid, there would appear to be a lack of subject-matter jurisdiction over the original action leading to the relator's imprisonment until the heavy fine imposed is paid. For the ground taken below, Menashe v. Sutton, D. C. S. D. N. Y., 71 F. Supp. 103, to the effect that appointment of an 'ancillary' receiver needed no separate basis of federal jurisdiction, seems unsound. Raphael v. Trask, 194 U. S. 272, 278; Kelley v. Queeney, D. C. W. D. N. Y., 41 F. Supp. 1015, 1018."

The little numerals refer to footnotes which read as follows:

1. The issue is now before the Supreme Court on grant of certiorari, 68 S. Ct. 746, in the National Mut. Ins. Co. case; it has quite divided the district courts and the law reviews, though it was suggested in 55 Yale L. J. 600, 603, in 1946, that the Court might "well resolve this divergence among the lower judiciary by declaring an act of Congress unconstitutional for the first time since 1936."

2. The district court's reliance on a brief quotation from Judge L. Hand's opinion in Goldman v. Staten Island Nat. Bank & Trust Co., 2 Cir., 98 F. 2d 496, 497, seems misplaced, because there appears to have been already in the district a proper ancillary receiver appointed where diversity of citizenship appeared. Cf. Prudential Ins. Co. of America v. Liberdar Holding Corp., D. C. E. D. N. Y., 6 F. Supp. 903, and id., 2 Cir., 85 F. 2d 504.

The amendment to 28 U. S. C. § 41(1) has been held unconstitutional by two Circuit Courts of Appeal in the cases of *Central States Co-ops.* v. *Watson Bros. Transp. Co.*, 165 F. 2d 392 (C. C. A. 7); *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 165 F. 2d 531 (C. C. A. 4).

2. THE RELATOR HAS NOT BEEN ACCORDED DUE PROCESS OF LAW.

Annexed to the petition is an order of Judge Coxe dated the 21st day of November, 1947, which purports to hold the relator as a contemnor and as such has imposed upon him a fine of $22,000.00. This order in turn is based upon an order entered on the 11th day of September, 1947, by Judge Medina. We maintain that the citing of the relator as a contemnor was had without due process of law by reason of the fact that Rule 16 of the Civil Rules of this Court was violated and ignored.

Of course, as outlined in Point 1, we maintain that any process issuing out of this Court is void for lack of jurisdiction. However, for the purpose of argument, only, even if this Court could be considered to have any jurisdiction, we respectfully submit that the procedure theretofore pursued violated its own rule. Rule 16 provides:

> "If an alleged contemnor puts in issue his alleged misconduct or the damages thereby occasioned, he shall upon demand therefor, be entitled to have oral evidence taken thereon, either before the Court or before a Master appointed by the Court."

The relator made such a demand as is required by Rule 16 for a hearing guaranteed to him by virtue of such rule.

The necessity for such hearing prior to contempt, is apparent by reason of the fact that the relator has definitely put in issue his alleged misconduct and/or the damages thereby occasioned and has specifically and under oath demanded the hearing to which Rule 16 entitled him. This demand appears in an affidavit made by the relator on the 13th day of November, 1947, as follows:

> "I respectfully deny that I have been guilty of any misconduct and particularly of any contempt of Court, and I further respectfully deny that the plain-

> tiff has in any way been damaged by my alleged misconduct, and respectfully request a hearing pursuant to Rule 16 of the Civil Rules of this Court."

There can be no question that the relator was not accorded a hearing within the plain measuring of this rule. The record clearly shows that there was no more than argument of counsel on the motion to punish the relator for contempt of court.

It is clear that argument of counsel is not such a hearing as is contemplated by Rule 16. That hearing is a judicial proceeding, separate and apart from argument—no Special Master was appointed to take testimony and the Court took none. There were no findings of fact upon which to predicate a finding of contempt. There was no opportunity accorded relator to be heard or to defend himself against these charges.

Had relator been accorded the hearing guaranteed to him, he would and can show affirmatively that not only was he not in contempt of court but that the sum of $22,000.00 for which he has been fined constituted personal funds which were personally delivered to him by Jack Menashe (the plaintiff in the plenary and ancillary actions).

The Court below did not, in its order, define the realm of contempt. In addition, the attorney for Jack Menashe does not seem to be able to do so. Annexed to the petition are minutes of the last hearing held before the Special Master. He states (page 334):

> "The contempt, as I understand it, was predicated upon the entire testimony, and the entire testimony of this witness was presented before Judge Coxe, and presumably read by him. The contempt is most general because the conduct of the witness throughout the entire examination was anything but frank."

And then he goes on to say:

> "* * * the witness was found in contempt because he violated the injunctive orders of this Court in with-

> drawing three thousand dollars from a partnership account and retaining said sum; and further in transferring $19,000 to a bank in Mexico last June. It was by reason of those two sums, and the only two sums that were then called to the Judge's attention, that he was fined the sum of $22,000."

Further, an examination of these minutes, which are annexed to the petition, reveals that when relator attempted to clarify his situation by offering to answer any question within the realm of the alleged contempt, such offer was summarily refused. The realm of the alleged contempt has never been defined, so that the relator is left in a position of not being able to ascertain just *what* constitutes contempt.

We respectfully submit, therefore, that any order citing relator for contempt of court made without a hearing and in violation of Rule 16 must be declared invalid, as a violation of his civil and Constitutional rights.

3. THERE IS NO AUTHORITY IN LAW FOR THE ORDERS UPON WHICH THE ALLEGED CONTEMPT IS BASED.

Assuming further, without conceding, that this Court had jurisdiction to entertain this action for the appointment of the Ancillary Receiver, once the Receiver was appointed all the proceedings that followed have no basis in law.

A Receiver is not appointed by the Court for the benefit of either of the parties, but of all concerned:

> "He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. Jeremy, Eq. 249; Davis v. Marlborough, 2 Swanst. 125; Shakel v. Marlborough, 4 Madd. 463. He is required to take possession of property as directed because it is deemed more for the interest of justice that he should do so than that the property should be in the possession of either of the parties in

> the litigation. Wyatt, Prac. Reg. 355. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in custodia legis. Davis v. Gray, U. S. 203."

Particularly is this basic rule true where the parties are former partners. The Appellate Division of the Second Department made this point clear in the case of *Cass* v. *Apfel* and *Patrick E. Callahan, as Receiver,* 218 App. Div. 776. "It clearly appears that plaintiff and defendant, as former partners, have an equal interest in the corporation above named. That interest should be turned over to the Receiver so that he may represent these litigants in the corporation and take steps to have the stock issued, thus the interests of both parties will be represented in the management of the properties. The defendant should not be permitted to control indirectly partnership property in the face of the Receivership."

Since a Receiver represents all of the members of a partnership any cause of action that may be had belongs to the Receiver and to him alone. In the light of this principle, it is now pertinent to analyze the steps that followed the appointment of the Receiver herein. The order for the examination of the relator was *not* obtained by the Receiver in a proceeding instituted by him. It was obtained by the plaintiff, the former partner of the relator, who has no greater rights than the relator. Any rights, duties or powers to reduce to the possession of the Receiver partnership property belong to the Receiver and to him alone.

Not only was this fundamental rule violated in the instant proceeding but in addition thereto, the order directing the examination herein has no basis either in the Judiciary Code or in the Federal Rules. The examination certainly does not come within the purview of Rule 26 which is entitled "Depositions Pending Action" and the first part of which reads as follows:

> "(a) *When Depositions May be Taken*—By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The depositon of a person confined in prison may be taken only by leave of court on such terms as the court prescribes."

A reading of the rule, emphatically indicates that it concerns itself with what is known as a pre-trial examination. In the instant matter, a judgment has been entered appointing a Receiver, hence the examination ordered could not be categorized as a pre-trial examination. Here again, even if it were categorized as a pre-trial examination, the proceedings subsequently taken against the relator were without basis whatsoever. Rule 37 of the Federal Rules of Procedure entitled: "Refusal to Make Discovery: Consequences"—the pertinent part of subdivision "a" reads as follows:

> "(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer."

The pertinent part of subdivision "b" is as follows:

> "(b) Failure to Comply with Order. (1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court."

The record is barren of any suggestion that this procedure was followed. On the contrary, peremptorily and in violation of the relator's fundamental Constitutional rights he was adjudged in contempt and committed.

Since it is contended by the relator that the order for the examination could not possibly have come within the purview of Rule 26 dealing with pre-trial examinations, we have to search the rules to see whether there is any authority whatsoever under any other rule for the proceeding taken herein. Apparently, the only other rule dealing with any other examinations is Rule 69 entitled "Execution", subdivision "a" of which reads as follows:

> "(a) In General—Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution *shall be in accordance with the practice and procedure of the state in which the district court is held,* existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held." (Italics ours.)

This rule cannot possibly apply to the within proceeding or to the relator for a reading thereof indicates that it sets forth provisions for execution and provision for supplementary proceeding, which said proceeding in the words of the rule "shall be in accordance with the practice and procedure of the state in which the District Court is held." Since the matter is in the Southern District of the State of New York, we must turn to the Civil Practice Act of the State of New York, Section 773 thereof:

> "To entitle a judgment creditor to maintain a special proceeding authorized by this article the judgment must have been rendered *in any sum* by a Court of this State whether or not of record. A decree or order awarding *the payment of money* shall be deemed judgment for the purpose of this article."

Two vital factors can be noted:

1. There must be a judgment decreeing the payment of a *sum of money.*

2. The special proceeding must be instituted by a judgment creditor.

By no stretch of the imagination can this judgment appointing a Receiver be deemed a judgment within the purview of the above section or within the purview of Rule 63. Nor is this a judgment in favor of the plaintiff and against the defendant for any sum of money. The basic element, that of a judgment creditor who is entitled to maintain the proceeding, is *completely lacking.* The plaintiff in the action in which the receiver was appointed is no more a judgment creditor than the relator. Therefore, the orders which appear to be the basis for the alleged contempt are void.

4. HABEAS CORPUS IS THE PROPER REMEDY HEREIN.

As demonstrated, *supra*, the District Court of the United States for the Southern District of New York has no jurisdiction whatsoever herein. Corollarily, habeas corpus is a proper remedy to secure the discharge of the relator for imprisonment for his alleged civil contempt. Just as it is axiomatic in our law that habeas corpus may not be used as a writ of error or appeal (*U. S. ex rel. Tisi* v. *Tod*, 264 U. S. 131, 68 L. Ed. 590, 44 S. Ct. 260), it is equally certain that the question of jurisdiction can always be challenged by writ of habeas corpus. This is particularly true in the instant case, where as will be hereinafter demonstrated an interlocutory order of civil contempt can not under any circumstances be appealed (*In re Fox* v. *Capital Co.*, 299 U. S. 106, 81 L. Ed. 68).

The proposition that habeas corpus is the proper remedy to challenge jurisdiction is not new.

In re Reese (107 F. 942), the Court stated at page 948:

> "The petitioner not being a party, was not subject to the jurisdiction of the Court in that case, and the Court had no authority to punish him for the offense as charged * * *. This conclusion precludes all further inquiry as to the availability of a writ of habeas corpus as a remedy to secure the discharge of the prisoner. Ex parte Ayres, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216, is direct authority for this conclusion."

That this Circuit is in accord with this proposition is demonstrated by the case of *Bens* v. *United States* (266 F. 152, certiorari denied, 254 U. S. 634). Circuit Judge Rogers, in delivering the opinion of the Court stated at page 159:

> "It therefore sufficiently appears that the writ may be used where one is restrained of his liberty by the act of a court which is without jurisdiction, or where it is without power to impose sentence."

In *Ex parte Lam Pui,* 217 F. 456, District Judge Connor, speaking for the District Court for the Eastern District of North Carolina held, at page 461:

> "If there be no jurisdiction, no power vested in the tribunal, or officer to deprive him of his liberty, the mandate upon which the ministerial officer acts is utterly null and void and petitioner is restrained of his liberty."

In *Ex parte Steiner,* this very Circuit Court held (202 F. 419), by Circuit Judge Ward, at page 420:

> "We are satisfied that the power to punish for contempt by imprisonment * * * does involve the question of jurisdiction of the Court as distinguished from mere error."

The above-quoted language is directly in point with the situation existing in the instant appeal. That the procuring of a writ of habeas corpus based upon a void contempt process, is a proper remedy, was decided in *Ex parte Perkins,* 29 F. 900. The Court held, at page 908:

> "* * * but if a court having no jurisdiction over the party or the subject-matter before it, sentences a party, a witness or any other person to imprisonment for contempt of its authority, the person thus legally deprived of his liberty may be released by any court authorized to issue writs of habeas corpus. Ex parte Fisk, 113 U. S. 713 * * *."

In *Ex parte Burrus,* 136 U. S. 586, the Supreme Court of the United States held that where the District Courts have no jurisdiction of the cause, one imprisoned by authority of a District Court for violation of an order thereof was illegally imprisoned and thus would be released by virtue of a writ of habeas corpus.

Thus it is apparent that as a general principle of law the question of jurisdiction can always be raised by a writ of

habeas corpus. The courts however, have gone even further, and in applying the rule that a writ of habeas corpus can not be used as a substitute for a writ of error have frequently referred to the statement contained in the case of *Johnson* v. *Zerbst,* 304 U. S. 458, 82 Law Ed. 1461:

> "These principles, however, must be construed and applied so as to preserve-not-destroy the constitutional safeguards of human life and liberty."

This statement was quoted in the decision of *Council* v. *Clemmer,* 165 F. 2d 249, in which the Court stated:

> "however, the limitations upon the remedy afforded by habeas corpus should be flexible and readily available to prevent injustice."

The aforementioned cases have been cited to indicate the zeal shown generally by the courts when an individual challenges his illegal detention. However, in the instant proceeding, reliance need not be made on these general principles to indicate the availability of the writ of habeas corpus as a remedy. The decisions of the United States Supreme Court (*Ex parte Fisk, supra, In re Fox* v. *Capital, supra*) and the Circuit Court of Appeals in this circuit (*Penn Cement Co.* v. *Bradley Contracting Co.,* 274 F. 923), clearly indicate that the writ of habeas corpus is the only remedy available to the relator herein.

However, in spite of these decisions clearly giving such remedy to the relator it has been erroneously urged in the court below that the proper remedy for relator was to appeal from the contempt order and not by the writ of habeas corpus.

In order to indicate the complete paucity of any legal basis to this argument, we must analyze the nature of the civil contempt order and appellate jurisdiction thereof, if any. As hereinbefore set forth, the alleged contempt arose from a refusal to answer the questions in an examination in "aid of judgment". If there is any validity to the examina-

tion it must perforce come within the category of supplementary proceedings. The question then is poised: Does an individual refusing to answer questions in supplementary proceedings have a right to appeal from the order adjudging him in such civil contempt? The answer was clearly given by the United States Supreme Court in the recent case of *Fox* v. *Capital Co.* (*supra*).

In that case the question was whether there is jurisdiction in the Circuit Court of Appeals to entertain an appeal from an order finding a judgment debtor in contempt for refusal to submit to an examination in supplementary proceedings. The Supreme Court granted certiorari in order.

> "to settle the practice in a situation likely to recur and limited it to the question of the jurisdiction of the Circuit Court of Appeals."

The Court dismissed the appeal with the statement——

> "The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review on appeal an order fining or imprisoning him for the commission of a civil contempt."

In view of the fact that the alleged civil contempt involved in the instant proceeding allegedly arises in an examination in "aid of judgment", the same result would necessarily follow. The Court in its opinion in the *Fox* case cited the case of *Doyle* v. *London Guarantee & Accident Co.*, 204 U. S. 559, 51 L. Ed. 641 in which case the court, after a very thorough review of all the decisions involving appeals from orders arising from civil contempt, states:

> "As a result of these decisions, we deem it settled that an order punishing for contempt made in the progress of the case when not in the nature of an order in a criminal proceeding, is regarded as interlocutory to be reviewed only when appealed from a final decree in the case."

These decisions are within the framework of the statutory provisions as to the appellate jurisdiction of the Circuit of Appeals which said provisions limit the Circuit Court in appellate jurisdiction to matters involving final decisions (28 U. S. C. 225 Judicial Code 128).

Barred by judicial decisions and statutory provisions from appealing from the order adjudging the relator guilty of civil contempt what is his remedy to test the jurisdiction of the Court? Fortunately the answer can be found in the unequivocal decisions of the United States Supreme Court (*Ex parte Fisk, supra*) and the Circuit Court of Appeals in this Circuit (*Penn* v. *Bradley, supra*).

The *Fisk* case arose from an application on the part of one Clinton D. Fisk for a writ of habeas corpus. Francis Fogg brought suit in the Supreme Court, State of New York, against Fisk to recover the sum of $63,250.00, on the allegation of false and fraudulent representation. Thereafter, plaintiff obtained an order from the court for an examination before trial. The defendant appeared and submitted to a partial examination, answering to some questions and objecting to others.

In the meantime, he removed the case to the United States Court. In that Court, an order was made to continue the examination before a Master. The defendant refused to be sworn and declined to be examined.

A motion to punish him for contempt was adjourned pending the entry of an order directing him to appear and be examined. The defendant appeared before the court in pursuance of this order and stated that he was advised by counsel that the court had no jurisdiction to require him to answer in this matter to the questions propounded to him by counsel for the plaintiff. He refused to do so. He was fined $500 and committed to the custody of the marshal until it was paid. Thereupon, he sued for the writ of habeas corpus.

The Court stated, on page 718:

> "When, however a court of the United States undertakes by its processes of contempt to punish a man for

> refusing to comply with an order which that court had no authority to make, the order itself being without jurisdiction, is void and the order punishing for the contempt is equally void. It is well settled now in the jurisprudence of this court that when the proceedings for contempt in such a case results in imprisonment, this court will by its writ of habeas corpus, discharge the prisoner. It follows necessarily that on a suggestion by the prisoner that for the reason mentioned, the order under which he is held, is void, this court in the language of the statute 'makes inquiry into the cause of restraint of liberty.' Section 752RS. * * * "

The Court then came to the conclusion that the Circuit Court (p. 726):

> " * * * was therefore without authority to make the orders for examination of petitioner in this case and equally without authority to enforce these orders by process for contempt. Its orders fining him for contempt and committing him to the custody of the marshal was without jurisdiction and void and the prisoner is entitled to his release."

In the case of *Penn* v. *Bradley, supra,* officers of a company refused to execute deeds to a Receiver. Upon appeal from an order punishing the officers for a civil contempt, the Circuit Court of this Circuit dismissed the appeal on the ground that it was interlocutory and hence not appealable and indicated the correct legal course to be followed by making the statement:

> "A proceeding by habeas corpus would have been appropriate to this order."

Apparently the erroneous argument of unavailability of writ as a remedy made some impression on the court for in dismissing the writ, Judge Clancy made an informal notation on the papers "See *United States* v. *Jaeger,* 117 F. (2d)

483." It is respectfully submitted that the *Jaeger* case has no application whatsoever to the instant proceeding and is clearly distinguishable therefrom. The *Jaeger* case (*supra*), involved an appeal from an order in bankruptcy. Section 47 Title 11 of the U. S. C. A. provides as follows:

> "Jurisdiction of Appellate Courts. a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury; shall extend to matters of law only: Provided, further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.
>
> b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Therefore, there can be no question whatsoever that the Circuit Courts have appellate jurisdiction both from interlocutory or final orders arising in contempt proceedings in bankruptcy. As stated in the case of *Leco Properties, Inc.* v. *R. E. Crummer & Co.*, 128 F. (2d) 110 "but if they were interlocutory, there are orders in controversy arising in proceedings in bankruptcy, and appealable whether interlocutory or final under Section 47, Title 11, U. S. C. A."

Apparently the court in deciding the *Jaeger* case, *supra*, must have had this provision in mind for the citations con-

tained in the opinion refer either to matters in bankruptcy in which an appeal from an interlocutory order may be taken as hereinabove set forth or matters involving criminal contempt which have always been held to be final orders, and hence appealable. One of the cases cited therein was *Craig* v. *Hecht,* 263 U. S. 255, which involved a criminal contempt. The case arose in this Circuit, and Judge Learned Hand, writing a vigorous dissenting opinion, 282 F. 138, in which he set forth the doctrine that even in criminal contempt where jurisdiction is challenged: "The writ will lie when the conviction is for violation of an order which the court had no power to make. *Ex Parte* v. *Rowland,* 104 U. S. 604, 26 L. Ed. 861."

Judge Hand further stated, on page 157, "that the cases are clear authority for the proposition that habeas corpus will at time, any way, examine whether the underlying facts necessary to the commitment exist." The statement concerning Judge Hand's dissent in the *Craig* case are merely submitted as indication to what extent the courts would go to protect the rights of an individual who is challenging his imprisonment under a void order, even in cases of criminal contempt, where, as a general principle of law, an appeal from the order is the proper remedy, and not a writ of habeas corpus.

However, in view of the clarity and certainty of the decisions of the United States Supreme Court and of the Circuit Court of Appeals in this Circuit there can be no doubt whatsoever that in matters arising from civil contempt proceedings, such as have taken place herein, the order adjudging the relator guilty of such civil contempt is an interlocutory order which is non-appealable and that habeas corpus is the only remedy available to the relator herein.

CONCLUSION.

THE WRIT OF HABEAS CORPUS HEREIN SHOULD HAVE BEEN SUSTAINED AND THE APPEAL SHOULD BE GRANTED AND FOR THE REASONS STATED IN THE PETITION AND IN THIS BRIEF IT IS RESPECTFULLY SUBMITTED THAT THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

BURTON B. TURKUS,
Attorney for Relator-Petitioner.

No. 178

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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

UNITED STATES OF AMERICA *ex rel.* MURAD A. SUTTON,

Relator-Appellant,

against

JAMES MULCAHEY, United States Marshal for the Southern District of New York, and EDWARD E. THOMPSON, Warden of the Federal House of Detention,

Respondents-Appellees,

v.

JACK MENASHE,

Respondent-Impleaded-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE A. FERRIS,
Attorney for Respondent
Impleaded Appellee.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

This is a collateral proceeding initiated by a writ of habeas corpus. In the title of the writ the name of the respondent does not appear (184). An application was made on December 23, 1947, by the United States Attorney to introduce the respondent as a party to the proceeding (226-8). The motion was granted by Judge God-

dard on January 6, 1948 (233-7). In the main case the respondent was the plaintiff and the defendants, the relator individually and as trustee of Sutton Trusts, and his wife, Adele Ancona Sutton. The action was to procure the appointment of a permanent ancillary receiver and other relief.

On January 10, 1947, there was presented to Judge Rifkind a set of papers including the complaint in the main suit and an affidavit requesting the appointment of a temporary ancillary receiver. Judge Rifkind appointed Mr. Oseas (p. 202). The appellant and his wife moved by order to show cause dated January 17, 1947, for dual relief: to dismiss the case and, as well, to vacate the order of Judge Rifkind dated January 10, 1947. The particular language of the order to show cause in so far as it is here pertinent read:

> "why an order should not be made and entered herein dismissing the above entitled action for lack of jurisdiction over the subject matter and controversy thereof, and over the person of the defendants, Murad A. Sutton and Adele Ancona Sutton, for the reason that there is no diversity of citizenship, between the plaintiff and the defendants, Murad A. Sutton and Adele Ancona Sutton are residents of the same state, to wit, the State of New York, and vacating the ex parte order dated Juanary 10, 1947, appointing I. B. Oseas, as ancillary receiver herein."

In a memorandum submitted by the appellant and his wife it was conceded that diversity of citizenship was alleged in the complaint. This was the phraseology:

> "The defendants, Sutton, move to dismiss the complaint on the ground that this court has no juris-

> diction to entertain the same. Jurisdiction of this court is claimed in the complaint by reason of diversity of citizenship. (Paragraphs 1-3 of complaint.)"

Judge Hulbert heard the argument, reserved decision and wrote an opinion reported in 71 Fed. Supp. 103, denying the motion in all respects.

On February 10, 1947, Adele Ancona Sutton served her answer denying paragraphs "1" and "3" of the complaint which alleged diversity and asserted four separate defenses. The first and fourth are of particular pertinence now. The first defense read:

> "That this defendant and the defendant, Murad A. Sutton, are citizens and residents of the State of New York, and reside in the city of Long Beach, County of Nassau, State of New York."

The fourth defense read:

> "It is not true as alleged in said complaint that defendant is a resident and inhabitant of the Territory of Hawaii and defendant avers that said defendant was at the commencement of this suit and now is a citizen and resident of the State of New York, of which state the plaintiff was at the commencement of this suit and now is a citizen and resident."

The appellant served his answer on April 8, 1947. It contained the same denials and the same separate defenses with regard to jurisdiction.

Orders were procured, over bitter opposition, compelling Sutton and his wife to submit to examination before trial. The objective always was, as indeed the pur-

pose of the respondent is presently, to discover assets in this area belonging to the partnership described in the complaint so that they might be turned over to the ancillary receiver. Almost every device known to astute and resourceful counsel was employed to block, defeat and frustrate the respondent and prevent the development of the appropriate facts. There were innumerable applications before almost every judge below and, in each instance, the Suttons were defeated.

Recognizing that the respondent was gradually forcing him and his wife to disclose the disposition of partnership assets abstracted from Hawaii and transported to this country, the appellant and his representation conceived a plan. In an endeavor to terminate the examination that was such a sharp thorn in their sides they, in July, 1947, served a paper entitled "Consent to judgment" in which they specifically withdrew their answers and agreed that judgment might be entered in favor of the plaintiff, the respondent here (209).

At page 2 of the appellant's petition, it is stated that a judgment was entered "on consent" on July 31, 1947, appointing Mr. Oseas permanent ancillary receiver. That is not quite accurate. True, it was on the consent of the appellant and his wife but it was not with the consent of the respondent. Indeed, as the appellant's prior counsel, Mr. Begun, will attest, we opposed the application for leave to enter judgment with great vigor. Judge Holtzoff, however, entertained the view that he had no discretion in the matter and that if the defendants wished to consent to judgment in favor of the plaintiff for the relief demanded

in the complaint there was nothing he could do about it. The judgment was prepared on the stationery of the attorneys for the appellant and, after the recitals, read in part:

> "NOW, THEREFORE, it is on motion of Begun Brothers, attorneys for the defendants, Murad A. Sutton, Murad A. Sutton, as trustee of Sutton Trusts, and Adele Ancona Sutton,
>
> ORDERED, ADJUDGED AND DECREED, that the plaintiff is granted judgment against the defendants, Murad A. Sutton, Murad A. Sutton as trustee of Sutton Trusts, and Adele Ancona Sutton, for the relief demanded in the complaint, * * *."

There followed other provisions appointing Mr. Oseas permanent ancillary receiver, enjoining a disposition of the property, commanding the parties to deliver "forthwith" to the ancillary receiver all partnership assets of every kind, nature and description and the like.

But the glee of the appellant was short-lived. An application was made by the respondent before Judge Medina to direct the Suttons to submit to examinations before the Special Master in a proceeding supplemental to the judgment. Later in this brief we will discuss the arguments presented by the appellant to Judge Medina and his disposition of them. In the end Judge Medina granted the motion by order dated September 11, 1947. An appeal was taken to the Circuit Court. Application was made before Judge Medina for a stay. That Judge stated very frankly that in his opinion the appellant was "stalling" (216). He granted a temporary stay for the sole purpose of

enabling the appellant to move for a stay in the Circuit Court. When the matter was argued there, the stay was denied from the bench upon the ground that the order was not appealable.

On November 21, 1947, Judge Coxe signed an order punishing the appellant for contempt (125-35). Sutton was granted the opportunity to purge himself by testifying "fully and not evasively, with respect to the matters specified in the order of Judge Medina dated September 11, 1948" (135).

The appellant declined so to testify and made no application to be relieved of the contempt.

On December 6, 1947, present counsel for the appellant moved for a reargument. That motion was denied by order of Judge Coxe on December 12, 1947 (204). On December 15, 1948, Judge Coxe signed the commitment order (204).

No appeal was ever taken from the contempt order, the order denying the reargument or the commitment order.

On December 11, 1947, the appellant appeared before the Special Master with his attorney, Mr. Donoghue. The sole contention made at that time was that Mr. Ferris, the attorney for the respondent, was disqualified from further interrogation because of an alleged adverse interest (149). As Mr. Donoghue put it:

> "Mr. Donoghue: Our position is that Mr. Ferris is not qualified to ask any questions; therefore, I think the record clearly shows that Mr. Sutton's

position is that he won't answer any questions or do anything emanating from the propounding of a question by Mr. Ferris." (165)

Mrs. Sutton was called to the stand and declined to answer for the same reason (177).

The record discloses, however, that the appellant refused to answer questions even when put to him by the Special Master. Moreover, he disobeyed the subpoena *duces tecum* issued out of the District Court. Manifestly, the totally unfounded claim of disqualification by Mr. Ferris as the reason for failing to answer questions was made in the worst possible faith. It was merely an additional device to prevent a revelation of the truth.

Sutton has been at liberty under a bond. At no time did he assert inability to pay the fine.

POINT I

Habeas corpus does not lie because the jurisdiction of the Court was directly assailed in the main case and resulted unfavorably to the appellant and he is therefore precluded from renewing the attack collaterally.

In an effort to convince this Court to accept a review the appellant pretends that multitudinous problems of unparalleled complexity are presented. Actually the single issue is this: Where a defendant challenged the jurisdiction of the District Court and lost and had the opportunity for further assault in the original court and on appeal,

may the ensuing judgment be collaterally attacked on jurisdictional grounds through the medium of habeas corpus.

Judge Swan wrote in this case:

> "Where the question of jurisdiction has been litigated that issue is ordinarily immune from collateral attack."

Concurring, Judge Clark observed:

> "I guess Judge Swan does more nearly state the current view."

Our research discloses an unbroken line of decisions by this Court in support of Judge Swan's thesis.

Matter of Cuddy, 131 U. S. 280, 285;
Craig v. *Hecht*, 293 U. S. 255, 277;
Stoll v. *Gottlieb*, 305 U. S. 165;
Chicot v. *Baxter*, 308 U. S. 371;
Sunal v. *Large*, 332 U. S. 174, 179;
Sherrer v. *Sherrer*, 92 Law Ed. Vol. 92, pp. 1055, 1060, 1062, 1072.

Illustrative of our contention that this Court has long enunciated and repeatedly adhered to the sound doctrine of preclusion from collateral attack we quote chronologically pertinent extracts from the foregoing authorities.

In *Matter of Cuddy, supra*, this was written:

> "And in *Galpin* v. *Page*, 84 U. S. 18, Wall. 350, 365 (21: 959,962), the court said: 'It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is

> presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also.' The general rule that, unless the contrary appears from the record, a cause is deemed to be without the jurisdiction of a Circuit or District Court of the United States—their jurisdiction being limited by the Constitution and Acts of Congress—has no application where the judgments of such courts are attacked collaterally."

Not only has a habeas corpus proceeding been recognized by the courts as collateral but the appellant in this very proceeding pushed the doctrine to its extreme. Neither the respondent nor his attorney was notified of the release of the appellant in the custody of his attorney (194). The respondent was not, as already noted, named in the title. Indeed, in the memorandum submitted to Judge Clancy the appellant advised the Court at page 4:

> "It is assumed that the attorney for Menashe will attempt to argue upon the return of this writ. We respectfully point out to this learned court that the Federal Rules of Procedure make no provision for the participation of a third party or his attorney in this ex parte proceeding."

Nevertheless, the respondent was brought into the proceeding. He was deemed a necessary party both by Judge Rifkind and Judge Goddard. It seems quite plain, therefore, that the appellant is attempting, in a purely collateral proceeding, to attack the jurisdiction of the Court

in the principal case. In this view all the judges below united.

In *Stoll* v. *Gottlieb, supra,* this was written:

> "After a Federal Court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.
>
> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

In *Chicot* v. *Baxter, supra,* this was written:

> "The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District

> Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally." (p. 376.)

And again at page 377:

> "*The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata* in a collateral action. Stoll v. Gottlieb, 305 U. S. 165, 171, 172, 83 L. Ed. 104, 108, 109, 59 S. Ct. 134, 38 Am. Bankr. Rep. (NS) 76." (Italics ours.)

In *Sunal* v. *Large*, supra, the Court said:

> "Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, habeas corpus is increasingly denied in case an appellate procedure was available for correction of the error" (179).

The latest exposition by this Court is contained in *Sherrer* v. *Sherrer, supra.* The following excerpts seem conclusive:

> "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine

> of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. The reasons for this doctrine have frequently been stated.
>
> • • •
>
> If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own."

On the same page this Court noted "the considerable modern development of the law with respect to finality of jurisdictional findings."

Apparently on the question now under discussion this Court appears in complete agreement. Mr. Justice Frankfurter, in his dissenting opinion in the *Sherrer* case, wrote:

> "*Res judicata* forecloses relitigation if there has been an opportunity to litigate once, whether or not it has been availed of or carried as far as possible, Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329, 60 S. Ct. 317, 41 Am. Bankr. N. S. 508. And it applies to questions of jurisdiction of subject matter as well as to that of persons. Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104, 59 S. Ct. 134, 38 Am. Bankr. N. S. 76; Treinies v. Sunshine Min. Co., 308 U. S. 66, 84 L. Ed. 85, 60 S. Ct. 44."

The Circuit Courts have throughout, so far as we have been able to discover, followed a course charted by

this Court. Thus in *Bostwick* v. *Baldwin,* 133 Fed. (2) 1 (CCA 5, cert. den. 87 L. Ed. 1699) the Court wrote:

> "This being a collateral attack upon the judgment, appellants' point is well taken if, but only if, the record on its face shows: *not merely that the requisite diversity of jurisdiction does not affirmatively appear but that it did not and could not exist,* Freeman on Judgment, Vol. 1, p. 722, Cyc. Federal Procedure, Vol. 1, p. 152; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; *and that the court did not find and adjudicate that it had jurisdiction.* Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 376, 60 S. Ct. 317, 84 L. Ed. 329; Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104." (Italics ours.)

The prevailing opinions of Judges Swan and Clark are in precise accord with prior decisions of the same court. For illustration, in *Sorenson* v. *Sutherland,* 109 Fed. (2nd) 714, Judge Augustus N. Hand wrote as follows at page 718:

> "The case at bar falls clearly within the rule of Stoll v. Gottlieb and of the Chicot County decision. Not only was there every opportunity to present the matters now relied on by the government in the trial before Judge Caffey, but those matters were expressly raised and argued before him. It is true that it was not argued to Judge Caffey that the material facts were 'jurisdictional'; but it was urged that the plaintiffs had no right to sue under the Trading with the Enemy Act—which is the very issue of jurisdiction which is now before this court. Apart from the failure to use the word 'jurisdiction' the parties to the previous trial could scarcely have raised the issue of right to sue more squarely."

And at page 719:

> "But in Chicot County Drainage District v. Baxter State Bank, supra, an earlier decision was held binding even though the question of jurisdiction had not been raised at the first trial, *because it might have been raised there and was necessarily involved.*" (Italics ours.)

And in *U. S.* v. *Jaeger,* 117 Fed. (2nd) 483, this was written:

> "It is now well settled that on contempt proceedings no attack can be made on the regularity, correctness, or validity of the original order. Oriel v. Russell, 278 U. S. 358, 49 S. Ct. 173, 73 L. Ed. 419, affirming In re Oriel, 2 Cir., 23 F. 2d 409, 413; In re Siegler, 2 Cir., 31 F. 2d 972; In re Arctic Leather Garment Co., supra; Id., 2 Cir., 106 F. 2d 99; cases collected 3 Moore's Collier on Bankruptcy, 14th Ed., 535-537. A like rule applies to habeas corpus proceedings; they cannot be used to review, as on appeal, the court action which has led to the commitment order. Craig v. Hecht, 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293; affirming Ex parte Craig, 2 Cir., 282 F. 138; Ex parte Kearney, 7 Wheat. 38, 20 U. S. 38, 5 L. Ed. 391; United States ex rel. Paleais v. Moore, 2 Cir., 294 F. 852.
>
> Relator has appealed from neither the commitment nor the contempt order; he therefore can raise here the issue of jurisdiction only. *Yet he had opportunity to and did raise that issue in the prior proceedings, and the court found against him. Even if we assume that the court was acting upon erroneous grounds as indicated above, yet Stoll* v. *Gottlieb,* 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104, *makes it clear that the matter is settled against collateral attack.*" (Italics ours.)

When the Chief Justice of this Court was sitting in the United States Court of Appeals for the District of Columbia he wrote in *Warring* v. *Colpoys*, 122 Fed. (2nd) 642 at p. 644:

> "This is a habeas corpus proceeding, a collateral attack upon a previous judgment of the District Court, accepted at the time as final. It is increasingly evident that 'jurisdiction' in the normal case is not subject to collateral attack. While habeas corpus is regarded more liberally than most forms of collateral attack, it is not to be used as an appeal or a writ of error."

Of all the cases that we have been able to discover dealing with similar questions, we state with confidence that this is the strongest for the respondent. The authorities unite in the view that a collateral attack may not be leveled at the jurisdiction in the main case either where the assault has been made and repulsed or where the opportunity existed for the attack. In this case there were both the attack and the opportunity for further attack.

Rule 12 of the Federal Rules of Civil Procedure provide how a challenge may be made to the jurisdiction:

> "(b). How PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted."

Under subdivision "(h)" entitled "Waiver of Defenses" this is the exception:

> "* * * except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

Rule 15(b) provides that where the question of jurisdiction is presented at the trial the court may conform the pleadings to the proof and generally may proceed with great liberality.

Before discussing what actually transpired here, it may be well to consider some of the leading cases on the subject of the challenge to the jurisdiction.

In *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, the Court wrote at page 186:

> "In *North Pacific S. S. Co.* v. *Soley*, 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87, supra, the suit was in equity and the question was whether the jurisdictional amount was involved. This plaintiff's allegation to that effect was denied by the answer. Upon hearing the evidence offered by the complainant, and that of the defendant, the trial court held that the jurisdictional amount was not involved and dismissed the suit. On direct appeal to this Court, under the former practice where jurisdictional questions alone were presented, the Court said: 'The objection that jurisdiction to entertain the suit did not exist is one which may be taken by answer. Anderson v. Watt, 138 U. S. 694, 34 L. Ed. 1078, 11 S. Ct. 449. Indeed,

> under Sec. 37 it is the duty of the court, when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the court to determine the question of jursidiction upon the facts presented, and when brought directly here, it is the duty of this court to review the decision *upon the testimony* as one presenting a jurisdictional question.' " (Italics ours.)

Concluding, the Court wrote at page 189:

> *"If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner,* he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence." (Italics ours.)

To the same effect, see:

> *Thomson* v. *Gaskill,* 315 U. S. 442, 446;
> *Kvos* v. *Associated Press,* 299 U. S. 269, 278.

The appellant did challenge the jurisdiction. He lost before Judge Hulbert. Whether or not he had the right to appeal from so much of the order as denied the motion to dismiss the complaint, the fact is that he did have the right to appeal from that part of the order that denied the motion to vacate the receivership.

In 28 U. S. C. A., Sec. 227, entitled "Appeals in Proceedings for Injunctions and Receivers", there is this provision:

> "Where, upon a hearing in a District Court, or by a Judge thereof in vacation, an injunction is granted, continued, modified, refused or dissolved by interlocutory order or decree, or an application to dissolve or modify an injunction is refused, *or an interlocutory order or decree is made appointing a receiver*, * * *."

It is provided that an appeal may be taken within thirty days after the entry of the order.

That the order was appealable see *Maxwell* v. *Enterprise*, 131 Fed. (2nd) 400 (C. C. A. 3); *Pacific Northwest Packing Co.* v. *Allen*, 109 Fed. 515, 548 (C. C. A. 521).

The appellant preserved his right. He interposed an answer specifically denying the allegations of diversity and asserting not one but two affirmative defenses alleging lack of diversity. The case received a number on the trial term calendar and would have been reached in regular course. Whatever the animating reasons the fact does remain that the appellant precluded the Court from ascertaining the facts bearing on the question of diversity and the respondent from introducing appropriate evidence.

It was the appellant who withdrew his answer so that the denials and defenses disappeared. It was the appellant, over the objection of the respondent, who insisted that judgment be entered in favor of the plaintiff and against him for the relief demanded in the complaint. True, he thought that the termination of the action would

automatically prevent a continuation of the examination. He was wrong. Judge Medina decided against him. Having gambled unsuccessfully he now asks the Court, in effect, to reinstate his answer and to place him in the position he occupied before he withdrew his answer and consent to judgment.

Thus the appellant made an unsuccessful challenge and himself destroyed the opportunity for further challenge. The authorities cited indicate that the Court, at the trial, may take proof on the question of diversity even by "suggestion" or upon its own motion. But how can the appellant, who, by his own act, deprived the respondent of the chance to submit his proof, profit by such a deliberate election.

If the appellant had answered and admitted the allegations of diversity in the complaint we doubt not that no issue would have been created. Is there not a greater admission when an answer containing denials and affirmative defenses is withdrawn?

In the appellant's brief much is made of the well recognized doctrine that lack of jurisdiction in the Federal Court cannot be waived. In the first place, that applies to a direct proceeding. Indeed, if the principal case had been tried and the appellant had lost and appealed from the judgment of the Court, the Circuit Court, of its own motion, might have scrutinized the record for jurisdiction. Collaterally a different question is presented because now there is "a presumption" in favor of the judgment which the unsuccessful attack promotes to "res judicata".

Here the position of the respondent is infinitely more powerful than in the usual case. Not merely did the

appellant acquiesce in the jurisdiction by silence but, on the contrary, he took an affirmative step. He, in effect, informed the Court that he was convinced of its jurisdiction, withdrew his denials of diversity, withdrew his defenses of lack of diversity and asked the Court to enter judgment in the case—thereby conceding that the Court had the power and the right so to do.

Of course if the 1940 amendment to 28 U. S. C. A. Sec. 41 (1) is valid there is no problem at all because then jurisdiction will, concededly, be manifest on the face of the complaint. It is affirmatively alleged that one of the parties was a citizen of the State of New York and the others of the Territory of Hawaii. The argument in this point has been predicated upon the assumption that doubt as to constitutionality does exist which will be resolved by this court in the case now pending before it (*National Insurance Company of the District of Columbia* v. *Tidewater Transfer Co. Inc.*, Docket 640).

Our contention has been throughout, and two of the Judges of the Circuit Court agree, that without regard to the correctness of Judge Hulbert's decision on the jurisdictional point, the appellant is permanently blocked from collaterally attacking the judgment.

The Dissenting Opinion of Judge Frank

We have always harbored the greatest deference for the dissenting judge. We are persuaded, however, that in this instance he has totally failed to appreciate the unswerving uniformity of this Court with respect to the doctrine of collateral attack and, as well, the catastrophic consequences of the views he seems to espouse.

The theory of the prevailing judges is correctly presented by Judge Frank when he writes:

> "My colleagues reason that Sutton was barred from such direct or indirect attack (1) because he had previously neglected to take a timely appeal from one or the other of two earlier appealable interlocutory orders (appointing, respectively a temporary and a permanent ancillary receiver) and (2) because on such a previous appeal, he could have raised the jurisdictional issue."

It is perfectly clear that when Judge Hulbert denied the application to vacate the temporary receivership and sustained the jurisdiction of the District Court an order, valid on its face, had been entered. A court of competent jurisdiction had declared that the case was properly in its court. That Sutton had abundant opportunity to appeal and to pursue the attack cannot be gainsaid. In the language of Judge Clark:

> "And it must be conceded that Relator did have plenty of opportunity to continue upon appeal the issue he had already raised below * * *."

The case continued in normal course, a judgment was entered and no appeal was taken from that. We doubt whether any lawyer could be discovered in whose mind there would lurk the faintest suspicion of the validity of such a judgment regularly recorded in the Clerk's docket.

Judge Frank seems to propose a new doctrine—a doctrine that courts and parties and the public should assume that all judgments are infected with doubt. That, of course, would be completely destructive to the inesti-

mably valuable element of certainty in judgment. A Damoclean sword would be eternally suspended over each judgment. And why? Because some day, perhaps a year or five years later, a defendant might feel, what Judge Frank is pleased to call "the bite".

This is truly a revolutionary philosophy! A judgment will now be valid, if Judge Frank is correct, only until a defendant decides that enforcement has proceeded far enough. Or, as the dissenting judge phrases it, until the judgment ceases to be "innocuous."

Suppose a plaintiff were to sue for a substantial sum and the defendant, attacking the jurisdiction, were defeated. He may appeal but rejects the chance. Apparently a valid judgment has been entered. Assume further, that defendant is judgment-proof and therefore indifferent. If he acquires affluence with the fulness of time he will probably then feel "the bite". The judgment creditor will demand his money. Should the defendant now be permitted collaterally to challenge the judgment and ask for a reconsideration of the jurisdictional question. Such a result, which Judge Frank seems to advocate, would sow chaos and cast a pall of doubt over innumerable Federal judgments.

The learned dissenting judge speaks of "a shocking result". But Sutton had his day in court on the jurisdictional question. He has had not one but three lawyers. The record is black with his efforts to avoid accounting to his partner for demonstrated violations of trust. At this stage, to allow Sutton to escape paying to the receiver the amount of partnership assets which Judge Coxe found

should minimally be turned over (by resorting, at best, to rehashed technicalities) would, indeed, be "a shocking result".

Judge Frank devotes considerable space to a discussion of Sutton's right to appeal from the contempt order. Admittedly he did not appeal. Judge Frank believes that the failure to appeal should be excused. We are unaware of any statute or decision equating a habeas corpus with the total absence of an appeal.

Even so, we are unable to comprehend how the appellant would be aided. The contempt decision occurred after the judgment, for wilful disregard of an order made subsequent to the judgment. Once again Sutton would be barred from collateral attack. He would be relegated to the merits of the contempt.

The *Sherrer* case was decided by this Court after Judge Frank wrote his opinion. That, together with *Sunal* v. *Large*, seems decisive.

POINT II

The Circuit Court of Hawaii is a federal legislative court even though it is not a federal constitutional court and, accordingly, no diversity of citizenship was necessary in the action for the appointment of an ancillary receiver.

The whole argument of the appellant stems from some language in *Mitchell* v. *Maurer*, 293 U. S. 237, at page 243. That language is set forth at page 104 of the opinion of Judge Hulbert, in 71 Fed. Supp. 103.

It seems to us that the appellant labors mightily to establish that the Hawaiian court is not "a court of the United States" but to little avail. He is bogged down in a morass of confusion and misapprehension. Apparently his starting point is this sentence of Judge Brandeis in the Mitchell case:

> "Obviously such an application is not ancillary to any proceedings *in any Federal Court.*"

The appellant has assumed the task of demonstrating to this Court that the Circuit Court of Hawaii does not fall within the classification of "any Federal Court." Without analyzing all of the authorities he cites, we think the Court will, upon investigation, reach this conclusion: There are two types of Federal Courts, constitutional and legislative. When the authorities refer to a particular court as not "a court of the United States" they are usually analyzing a certain statute. It is frequently found that it was not the intention of Congress to refer to a constitutional court for various assigned reasons. By "constitutional courts" is intended those courts referred to in Article III of the United States Constitution. But Judge Brandeis was not speaking of constitutional courts. He said "any Federal court." The problem is then, not whether the Circuit Court of Hawaii is a court of the United States in the constitutional sense but whether it falls within the category of any Federal court at all.

It seems to be conceded that in *McAllister* v. *United States*, 141 U. S. 174 (p. 21 of appellant's brief) a distinction was drawn between the two types of courts we have

mentioned. At page 27 of the appellant's brief there is a quotation to be found at page 184 of the *McAllister* case. Unfortunately the quotation is neither correct nor complete. In the appellant's brief, after the words "are not courts of the United States" there is placed a period. But in the volume itself there is no period. Indeed, there is no punctuation at all and the following language is added: "created under the authority conferred by that article" (referring to the third artitcle of the Constitution).

Thus, it is clearly indicated that the Court in the McAllister case was referring to constitutional courts and did not say that legislative courts are not courts of the United States in any sense.

A much later case was *Ex Parte Bakelite*, 297 U. S. 438. There the Court divided Federal courts into constitutional and legislative courts and wrote at page 459:

> "In creating courts for some of the territories Congress failed to include a provision fixing the tenure of judges; but the courts became legislative courts just as if such a provision had been included."

And further, at page 460:

> "Another feature to which attention was given is the denomination of the court as a United States Court. That the court is a court of the United States is plain; but this is quite consistent with it being a legislative court."

In commenting upon the *Bakelite* case this was written in 43 Harvard Law Review, page 894:

> "But decisions of the Supreme Court, culminating at the last term in Ex Parte Bakelite Corp. recognize

> *two classes of Federal courts* 'constitutional court' created pursuant to clauses above quoted and 'legislative court' created in the exercise of other legislative powers."

To the same effect see

24 Illinois Law Review 820.

Territorial Courts are legislative courts of the United States, subject to the plenary power and control of Congress.

Analysis of the Organic Act (Act of April 30, 1900, 31 Stat. 141) makes it clear that not only does Congress possess plenary power over territorial Courts, but that it has exercised this power over Circuit Courts of the Territory and has conferred, defined and limited their jurisdiction.

In *Mo Hock Ke Lok Po* v. *Stainback*, 74 Fed. Supp 852, the Court wrote at page 859:

> "There can be no doubt that Congress has paramount and plenary authority to legislate in all matters appropriate to the people of the territory of Hawaii-Inter-Island Steam Nav. Co. v. Territory of Hawaii, 305 U. S. 306, 59 S. Ct. 202, 83 L. Ed. 189."

Legislative Courts are Courts of the United States in the sense that they were created by Congress under authority of the Constitution. This is true whether the particular legislative court in question is the United States Court of Claims or a Territorial Court. This is uniformly recog-

nized by all legal digesting systems. Thus 20 Federal Digest 255, Title VII, under "Courts," is set up like this:

VII. United States Courts

G. Supreme Court.
H. Circuit Court of Appeals
I. Circuit Court
J. District Courts
K. Territorial and Provisional Courts
L. Courts of District of Columbia
M. Courts of Claims.

Territorial Courts are "Courts of the United States" as that term is used in the Seventh Amendment to the Constitution. See United States Constitution, Revised and Annotated, where it is said, at page 693:

"To What Courts Applicable.

This amendment applies only to courts sitting under the authority of the United States, including courts in the Territories and the District of Columbia. It does not apply to a State court even where it is enforcing a right created by Federal statute; the court in such case still derives its authority as a court from the State."

Conclusion: The Hawaiian Court is a federal legislative court. It appointed a receiver on consent and diversity was therefore unnecessary in the ancillary suit below.

POINT III

The orders of Judge Coxe, punishing the appellant for contempt and commiting him to jail, and of Judge Medina directing an examination supplemental to judgment, are not presently reviewable.

The appellant, in his Points 2 and 3, is grossly inconsistent. He admits that he has not appealed from Judge Medina's order or any one of the orders of Judge Coxe. He argues that they were not appealable. In the case of Judge Medina's order the Circuit Court so held. The papers in support of and in opposition to the motions culminating in such orders are not in this record. In *U. S.* v. *Jaeger,* 117 Fed. (2d) 483, the learned Court below expressly held that habeas corpus could not be used to review a contempt order. It would be unfair, not merely to the respondent, but to the Judge who believed his order was correct, to consider the merits in the absence of an appeal or any papers in the record.

Apart from the lack of power, this Court would, we are persuaded, concur with the dispositions below on the merits. The adversion to Rule 16 of the Civil Rules of the District Court is pointless. The papers upon which Judge Coxe's contempt order was based discloses that the appellant did not "put in issue", either his alleged misconduct or the amount of damages. True, at the conclusion of his affidavit, he asserted, by way of legal conclusion, that he was not guilty but a reading of the moving papers and the minutes and the affidavit in opposition and

all documents submitted to Judge Coxe would make crystalline that there was no issue. The appellant never denied that he had deliberately refused to take the stand and that he had violated the order of Judge Medina. Indeed, his prior attorney announced that he was pursuing that course according to plan. His thought was that the Circuit Court had, in effect, instructed the appellant to disobey the order, be punished for a contempt and in that way present a proper appeal. Of course the Circuit Court neither said nor indicated any such thing. It was merely discussing the authorities and ruled that an appeal did not then lie from the order of Judge Medina.

So far as the amount of the fine is concerned it was most conservative. It was minimal. Once again, if papers had been printed in this record, it would have become apparent that the amount of the fine was justified and was indeed inescapable mathematically.

Respecting the matter of the hearing under Rule 16, it should be pointed out that the appellant declined to appear before Judge Coxe at any time. When the matter was adjourned to the Chambers of Judge Coxe both counsel for the respondent and the Court asked for the appellant. He did not want a hearing. He absented himself purposefully so that he would not be compelled to take the stand. Had he done so the Court would probably have elicited the very information that the appellant was striving to conceal. The appellant protests, with tongue in cheek, that he was deprived of constitutional rights. It was impossible to drag him into court.

Respecting the order of Judge Medina, it has already been pointed out that the Circuit Court ruled that it was

not appealable. Here, too, the papers upon which the order was based are not printed. However, if the Court will examine folio 213 of the Record, it will find that all of the arguments and all of the contentions now relied upon by the appellant were regularly submitted to Judge Medina and considered by him.

Finally, in that connection, may we discuss briefly the nature of the judgment. The appellant does not seem to recognize that this was not a judgment for a sum of money and that accordingly Article 45 of the New York Civil Practice Act dealing with proceedings supplementary to execution is wholly inapplicable. The section of the law upon which Judge Medina acted is Section 293 of the Civil Practice Act which reads:

> "Sec. 293. *Order for taking testimony during the trial or after judgment.*
>
> Upon motion, made upon notice and upon proof of facts and circumstances which render proper the taking of testimony by deposition during the trial of the action, or after judgment in order to carry the judgment into effect, the taking thereof may be ordered by the court."

That section is in a different article altogether.

CONCLUSION

The petition for certiorari should be denied.

George A. Ferris,
Attorney for Respondent
Impleaded Appellee.